ORIGINAL

NO. 83-5905

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ERNEST FITZPATRICK, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

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P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
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ATTORNEY FOR PETITIONER
MEMBER OF THE BAR OF THIS COURT

QUESTIONS PRESENTED

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983), is set forth in Appendix A. The motion for rehearing is set forth in Appendix B, and the denial thereof in Appendix C.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered July 21, 1983, and petitioner's timely motion for rehearing was denied on October 13, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1979), which is set forth in Appendix D. This case also involves the Eighth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted of first degree murder, and on December 5, 1980, was sentenced to death. The trial court found six (6) statutory aggravating circumstances and no mitigating circumstances (Appendix E). The Supreme Court of Florida, on July 21, 1983, affirmed the conviction and death sentence. (Appendix A). The Court found that there was sufficient competent evidence to support the trial court's finding as to each of the six (6) aggravating circumstances, and the lack of any mitigating circumstances. Four justices concurred in the opinion of the Court. Justices McDonald and Overton, dissenting as to the sentence, found mental mitigation in the record and would have remanded for resentencing. 437 So.2d at 1079. Petitioner's timely motion for rehearing (Appendix B) was denied (Appendix C).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his brief on appeal, petitioner contended that imposition of the death penalty without consideration of proven mental mitigating circumstances violated the Eighth and Fourteenth Amendments. The Florida Supreme Court rejected petitioner's argument on this point as follows:

> Appellant also argues that his emotional condition should have been considered as a mitigating circumstance under subsections 921.141(6)(b), (e), and (f), Florida Statutes (1979). There was lay testimony that appellant had mental problems. This was corroborated by a clinical psychologist's testimony that appellant was someone of dull-normal intelligence with grandiose feelings and by a psychiatrist's testimony that appellant had a schizoid personality. All of this testimony was considered and rejected by both the jury and the judge. That decision was theirs and not ours to make. Since there was nothing in the record to indicate that their conclusions or the methods followed in reaching them were improper, we accept their conclusions.

437 So.2d at 1078.

Petitioner had cited two cases in his initial brief, Huckaby v. State, 343 So.2d 29 (Fla. 1977) and Halliwell v. State, 323 So.2d 557 (Fla. 1975), as authority for the proposition that the Florida Supreme Court has the power to find mitigating circumstances which were not found by the sentencing court. In his motion for rehearing, petitioner cited additional cases in which the Florida Supreme Court had found mitigating circumstances, relating to the defendant's mental condition and personality, which were not found by the sentencing court (Appendix B at 1-5). The Florida Supreme Court rejected this argument by denying rehearing without comment (Appendix C).

REASONS FOR GRANTING WRIT

QUESTIONS PRESENTED

QUESTION I

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In Lockett v. Ohio, 438 U.S. 586, 604 (1978), this Court held:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer...not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. (emphasis in original).

In Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court reaffirmed the principles of Lockett. There the trial court did not consider mitigating evidence, and neither did the state reviewing court on appeal:

> The Court of Criminal Appeals took the same approach. It found that the evidence in mitigation was not relevant because it did not tend to provide a legal excuse from criminal responsibility. Thus the court conceded that Eddings had a "personality disorder," but cast this evidence aside on the basis that "he knew the difference between right and wrong...and that is the test of criminal responsibility." 616 P.2d, at 1170. Similarly, the evidence of Eddings' family history was "useful in explaining" his behavior, but it did not "excuse" the behavior. From the statements it appears that the Court of Criminal Appeals also considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability.

Id. at 113. This Court found that the review process used by the Oklahoma appellate court, which failed to find mitigation even though not found by the sentencing court, is not the type of review which would sustain the imposition of the death penalty:

> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in Lockett. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, [emphasis in original] any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.[10]
>
> * * *
>
> 10. We note that the Oklahoma death penalty statute permits the defendant to present evidence "as to any mitigating circumstances." Okla.Stat., Tit. 21, §701.10 (1980). Lockett requires the sentencer to listen.

Id. at 113-115. (Footnote 9 omitted; emphasis added).

The same is true in the instant case. The trial court, just like the trial court in Eddings, seemed to believe that only legal insanity which would excuse a defendant's criminal conduct, could be mental mitigation (Appendix E at 3-4). The Florida Supreme Court expressly accepted this interpretation by refusing to find mental mitigating circumstances on appeal, just like the appellate court in Oklahoma. Although there was undisputed lay and expert testimony of mental mitigation recognized by the Florida Supreme Court, that court claimed to have no authority to find mitigation not found by the trial judge, although it had done so in several prior cases. Such an obvious violation of the principles of Lockett and Eddings cannot go

uncorrected.

QUESTION II

THE FLORIDA SUPREME COURT, IN AFFIRMING PETITIONER'S DEATH SENTENCE, WITHOUT EXPRESSLY COMPARING PETITIONER'S CASE WITH OTHER FLORIDA CAPITAL CASES IN WHICH A POLICE OFFICER WAS KILLED, HAS UPHELD HIS DEATH SENTENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Proffitt v. Florida, 428 U.S. 242, 250-51, 253, 258-60 (1976), this Court found Florida's capital punishment scheme constitutional, largely because the Florida Supreme Court had promised in the foundation case of State v. Dixon, 283 So.2d 1, 10 (Fla. 1973) that it would compare a death sentence under review with other decisions to determine if the death sentence was appropriate, in order to provide meaningful appellate review of the individual's death sentence. See also Barclay v. Florida, __ U.S. __ 33 Cr.L.Rptr. 3292, 3296-97 (Case no. 81-6908, opinion filed July 6, 1983), and especially the concurring opinion of Justice Stevens, 33 Cr.L.Rptr. at 3301. Since the killing of a police officer in Florida will most certainly give rise to at least one or two aggravating circumstances [hindering law enforcement, Section 921.141(5)(g), Florida Statutes (1979); and/or avoiding lawful arrest, Section 921.141(5)(e), Florida Statutes (1979)] it is absolutely essential that the Florida Supreme Court compare the death sentence in each case in which a police officer is killed with other similar cases, in order to avoid the type of mandatory death penalty for killing a police officer which was condemned by this Court in Roberts v. Louisiana, 428 U.S. 325 (1976). Petitioner will trace the Florida Supreme Court's opinions in all reported death cases in which a police officer was killed, [1] to show that the Florida Supreme Court has failed to conduct proportionality review

[1] Excluded from discussion is Manning v. State, 378 So.2d 274 (Fla. 1979), which was reversed for a new trial without discussion of the death sentence, and Hall v. State, 403 So.2d 1319 (Fla. 1981), in which the court reduced the first degree murder conviction to second degree murder due to insufficient circumstantial evidence of premeditation.

in this type of capital case.

Preliminarily, this Court should be aware that the Florida Supreme Court has announced in a trio of recent of capital cases [Messer v. State, Case No. 64,346 et al, opinion filed October 12, 1983; Booker v. State, Case No. 64,517, et al, opinion filed November 17, 1983; and Sullivan v. State, Case No. 64,511, et al, opinion filed November 21, 1983] all issued since this Court granted review in Pulley v. Harris, Case No. 82-1095, oral argument held November 7, 1983, that it does, either expressly or silently, conduct proportionality review in all capital cases. Assuming, arguendo, that the Florida Supreme Court does conduct a proportionality review, especially where it is done subsilentio, petitioner will argue that the Florida Supreme Court's ad hoc review is so unchanneled as to be no review at all, in violation of Proffitt, Barclay, and the Eighth and Fourteenth Amendments.

In Songer v. State, 322 So.2d 481 (Fla. 1975), the Florida Supreme Court found hindering law enforcement as an aggravating circumstance. The court did not discuss proportionality review except to note that it had a separate responsibility to determine whether the death sentence was appropriate. Id. at 484. After a remand in Songer v. Florida, 430 U.S. 952 (1977), the Florida Supreme Court did not discuss proportionality review, Songer v. State, 365 So.2d 696 (Fla. 1978), nor did it do so in an appeal from the denial of collateral attack in Songer v. State, 419 So.2d 1044 (Fla. 1982).

In Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976), the court found avoid arrest as an aggravating circumstance. The court further found that there was "no alternative to the death penalty", Id. at 1142, and affirmed Cooper's death sentence. On appeal from the denial of collateral relief, the court did not discuss proportionality review of Cooper's sentence. Cooper v. State, 437 So 2d 1070 (Fla. 1983).

Raulerson v. State, 358 So.2d 826 (Fla. 1978) is the only case in which the Florida Supreme Court has expressly stated that it had a responsibility to review a death sentence in light of

other decisions. The court found hindering law enforcement and compared Raulerson's case with six other cases, including one case in which the victim was a police officer, Songer v. State, supra. Id. at 834. The court affirmed Raulerson's death sentence.

In Mikenas v. State, 367 So.2d 606, 609-10 (Fla. 1978), the Florida Supreme Court found avoiding arrest as an aggravating circumstance and remanded for resentencing for other reasons. The court did not discuss proportionality review there, or on appeal after resentencing. Mikenas v. State, 407 So.2d 892 (Fla. 1981).

In Ford v. State, 374 So.2d 496 (Fla. 1979), the Florida Supreme Court found both hindering law enforcement and avoiding arrest. The court did not refer to any other cases, except to note that it had a duty to apply the aggravating and mitigating circumstances to the facts. Id. at 503. No discussion of proportionality review was made in the appeal from Ford's denial of collateral relief. Ford v. State, 407 So.2d 907 (Fla. 1981).

In Fleming v. State, 374 So.2d 954 (Fla. 1979), the Florida Supreme Court found avoiding arrest, but remanded for resentencing due to another error, without discussing other cases. Id. at 958-59.

In Jacobs v. State, 396 So.2d 713 (Fla. 1981), the court found both avoiding arrest and hindering law enforcement, but reduced Ms. Jacobs' sentence to life because a life recommendation by the jury was improperly overridden. In her codefendant's case, the court again found both aggravating circumstances, but did not compare his case with any others. Tafero v. State, 403 So.2d 355 (Fla. 1981).

The pattern was followed in the three most recent cases. In Johnson v. State, __ So.2d __ (Florida Supreme Court Case No. 61,341, opinion filed August 25, 1983), the court found avoiding arrest and did not discuss proportionality review. Slip opinion at 7-8. In Jones v. State, __ So.2d __ (Florida Supreme Court Case No. 61,492, opinion filed September 15, 1983), the court

found hindering law enforcement and did not discuss proportionality review. Slip opinion at 12-13. Finally, in Sims v. State, __ So.2d __ (Florida Supreme Court Case No. 57,510, opinion filed November 3, 1983), the court found both avoiding arrest and hindering law enforcement, but did not discuss proportionality review. Slip opinion at 5.

In the instant case, the Florida Supreme Court found "no question that the murder was committed...for the purpose of avoiding or preventing a lawful arrest." 437 So.2d at 1078. Thus, in the twelve cases in which a police officer was killed, the Florida Supreme Court only once, in Raulerson v. State, supra, expressly compared a death sentence with other capital cases, and has consistently approved the finding of at least one of the built-in aggravating circumstances, in affirming the death sentences in all but one case.

Since the Florida Supreme Court has stated that it does compare a death sentence under review with those in other cases, petitioner will accept that statement as true. Cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). But since the Florida Supreme Court has never said what form of proportionality review it conducts, any form of silent comparison cannot be subject to further review. This Court has held on many occasions that due process requires non-arbitrary appellate review. See, e.g., Vitek v. Jones, 445 U.S. 480, 488 (1980); Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). The same is of utmost importance in reviewing a death sentence. Proffitt v. Florida, supra; Barclay v. Florida, supra. The fact that the Florida Supreme Court has stated that it does conduct proportionality review, but without a hint as to what sort of review that is, should be enough to trigger this Court's interest. For example, does the Florida Supreme Court apply one or all of the three tests currently employed in California [In Re Lynch, 503 P.2d 921, 8 Cal. 3d 410 (1972)] which are currently under review by this Court in Pulley v. Harris, supra: (1) "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" (8 Cal.3d at 425); (2) the punishment

in the state for other crimes (8 Cal.3d at 426); and the penalty for the same crime in other cases (8 Cal.3d at 427)?

The survey of the twelve Florida cases noted above shows that the Florida Supreme Court, except once, has never given us a clue as to what form of proportionality review it conducts. This Court should accept jurisdiction of this case and consider it along with Pulley v. Harris, supra, to answer the important question of how the Florida Supreme Court avoids sanctioning an almost automatic death sentence where a police officer is killed.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted,

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, N.E., Washington, D.C. 20543; Mr. Ernest Fitzpatrick, Jr., #075320, Post Office Box 747, Starke, Florida 32091 and by hand delivery to the Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301 and to Gregory A. Smith, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 on this 8 day of December, 1983.

P. DOUGLAS BRINKMEYER

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ERNEST RITZPATRICK, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
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POST OFFICE BOX 671
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ATTORNEY FOR PETITIONER

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ORIGINAL

NO. 83-5905

IN THE

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October Term, 1983

ERNEST FITZPATRICK, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

ERNEST FITZPATRICK, JR., petitioner in the above-styled cause, hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit signed by petitioner is attached hereto, wherein petitioner sets forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Petitioner was adjudged insolvent for the purpose of appeal in the Florida Supreme Court and was represented there by appointed counsel.

WHEREFORE, it is respectfully requested that petitioner be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

COUNSEL FOR PETITIONER

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NO. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ERNEST FITZPATRICK, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

I, ERNEST FITZPATRICK, JR., being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. I believe that I am entitled to the redress I seek in said cause.

Ernest Fitzpatrick Jr.
ERNEST FITZPATRICK, JR.

STATE OF FLORIDA
COUNTY OF Bradford

The foregoing affidavit of Ernest Fitzpatrick, Jr., was subscribed and sworn to before me on this 26 day of October 1983.

J W Warren
NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1986

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. Ernest Fitzpatrick, Jr., #075320, Post Office Box 747, Starke, Florida, 32091; and by hand-delivery to the Honorable Sid White, Clerk of the Supreme Court, State of Florida, Tallahassee, Florida, 32301; and to Gregory A. Smith, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302, on this 8 day of December, 1983.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER

State, 365 So.2d 696 (Fla.1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), we held that the wording of the death penalty statute and the construction placed by this Court on that statute indicate unequivocally that the list of mitigating factors contained in this statute is not exhaustive. We referred to our earlier decisions in *Buckrem v. State*, 355 So.2d 111 (Fla.1978); *Washington v. State*, 362 So.2d 658 (Fla.1978), *cert. denied*, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 566 (1979); *McCaskill v. State*, 344 So.2d 1276 (Fla.1977); *Chambers v. State*, 339 So.2d 204 (Fla.1976); *Meeks v. State*, 336 So.2d 1142 (Fla.1976); *Messer v. State*, 330 So.2d 137 (Fla.1976); and *Halliwell v. State*, 323 So.2d 557 (Fla. 1975), among others, to demonstrate this Court's constant view that all relevant circumstances may be considered in mitigation and that the statutory factors merely indicate principal factors to be considered. We made clear that *Lockett* did not change the law in Florida since our law preexisting *Lockett* was consistent with the dictates of *Lockett*.

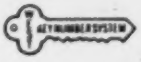
[2] Balancing the goals of the criminal justice system of ensuring finality of decisions and of ensuring fairness and uniformity in individual cases, in *Witt v. State*, we addressed the question of the significance of a change in decisional law on the finality of a fully adjudicated capital case. We explained the nature of a change of law that would be considered in a capital case under Rule 3.850 and said that this change of law must emanate from this Court or the Supreme Court of the United States, must be constitutional in nature, and must constitute a development of fundamental significance. *Lockett* did not change the law of Florida. Thus, Cooper, if he wanted to claim that the trial court unduly restricted the introduction of evidence relevant to nonstatutory mitigating circumstances, should have raised this claim on direct appeal. Having failed to do so, he may not now raise this claim for the first time in a rule 3.850 motion. Postconviction proceedings are not intended to afford defendant a second appeal of matters that were or could have been raised on direct appeal, and a defendant cannot argue on appeal the relevancy of evidence on one ground and then by collateral attack again argue the relevancy of that evidence on a different ground.*

Accordingly, the trial court's denial of postconviction relief is affirmed.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD and EHRLICH, JJ., concur.

OVERTON and McDONALD, JJ., concur in conviction, but dissent from sentence.



Ernest FITZPATRICK, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 60097.

Supreme Court of Florida.

July 21, 1983.

Rehearing Denied Oct. 13, 1983.

Defendant was convicted in the Circuit Court, Escambia County, M.C. Blanchard, C.J., of first-degree murder, two counts of attempted first-degree murder and three counts of kidnapping, and he appealed. The Supreme Court, held that: (1) trial judge did not abuse his discretion in declining to excuse for cause four veniremen who indicated tendency toward being in favor of death penalty; (2) defendant committed kidnapping regardless of distance victims were moved or time they were held;

* We incidentally note that the trial court did in fact allow some testimony relevant to nonstatutory mitigating factors.

(3) there was sufficient proof of premeditation to support defendant's conviction of first-degree murder and attempted first-degree murder; and (4) trial court did not err relative to finding of aggravating circumstances and failing to find mitigating circumstances.

Affirmed.

McDonald, J., filed opinion concurring in part and dissenting in part, in which Overton, J., concurred.

1. Jury ⇐108

Veniremen who oppose death penalty must be excused for cause only when irrevocably committed before trial to voting against death penalty under any circumstances or where their views on capital punishment would interfere with finding accused guilty.

2. Jury ⇐108

Judge need not excuse venireman in favor of death penalty unless he or she is irrevocably committed to voting for death penalty if defendant is found guilty of murder and is therefore unable to follow judge's instructions to weigh aggravating circumstances against mitigating circumstances.

3. Jury ⇐108

Trial court did not abuse its discretion in declining to excuse for cause four veniremen who indicated tendency toward being in favor of death penalty, where none of the four ever indicated that he was unalterably opposed to recommending life sentences for convicted murderers; therefore, defendant was not required to use four of his peremptory challenges to excuse those veniremen, and thus he did not have insufficient peremptory challenges. U.S.C.A. Const.Amend. 6.

4. Kidnapping ⇐1

There was sufficient evidence to show that defendant confined victims against their will with intent to use them as shields or hostages, and therefore, where defendant was charged under that portion of kidnapping statute defining kidnapping as unlawful confining of another person against his will with intent of holding him as a shield or hostage, defendant committed a kidnapping regardless of distance victims were moved or time they were held. West's F.S.A. § 787.01(1)(a)1.

5. Homicide ⇐232, 253(3)

Evidence that defendant stated to three hostages that he was going to shoot them after shooting police was sufficient proof of premeditation to support his convictions of first-degree murder and attempted first-degree murder.

6. Homicide ⇐354

Trial court's instruction that two aggravating circumstances did not apply was not error by implying that all other aggravating circumstances were applicable, because two circumstances in question depended on factors which could be objectively determined, and because jury was also instructed that an aggravating circumstance had to be established beyond a reasonable doubt and that if aggravating circumstances were found to exist they would have to be weighed against mitigating circumstances.

7. Homicide ⇐354

Trial court properly found as an aggravating circumstance that defendant had previously been convicted of felony involving threat or use of violence to another person on basis of contemporaneous convictions for kidnapping and attempted first-degree murder, even though he did not instruct jury on that aggravating circumstance. West's F.S.A. § 921.141(5)(b).

8. Homicide ⇐354

Murder occurred during raging gun battle with police with three hostages present, and therefore trial court properly found as an aggravating circumstance that defendant knowingly created great risk of death to many persons. West's F.S.A. § 921.141(5)(c).

9. Homicide ⇐354

Murder was committed while defendant was engaged in commission of felony, a

kidnapping, thereby supporting finding of aggravating circumstance that it was committed for purpose of avoiding or preventing lawful arrest. West's F.S.A. § 921.141(5)(d, e).

10. Homicide ⇐354

Finding of aggravating circumstance that murder was committed for pecuniary gain was supported by trial court's finding that defendant had planned bank robbery for several months and had proceeded as far as hostage stage before he was interrupted, even though robbery was never completed. West's F.S.A. § 921.141(5)(f).

11. Homicide ⇐354

Where defendant had attempted an armed robbery and a bombing of a school when he was a minor, trial court properly refused to find as mitigating factor that defendant had no significant history of prior criminal activity as an adult. West's F.S.A. § 921.141(6)(a).

12. Homicide ⇐354

Evidence supported finding that defendant was not suffering from mental problems, thereby supporting conclusion not to find mitigating circumstances of extreme or emotional disturbance. West's F.S.A. § 921.141(6)(b, e, f).

13. Homicide ⇐354

Record supported trial court's decision not to consider defendant's age of 20 years as a mitigating circumstance in conviction of first-degree murder, attempted first-degree murder and kidnapping.

14. Criminal Law ⇐163

Defendant's right against double jeopardy was not violated by imposition of separate sentences for three counts of kidnapping, because there was sufficient proof of premeditation. U.S.C.A. Const.Amend. 5.

P. Douglas Brinkmeyer, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Jim Smith, Atty. Gen. and Miguel A. Olivella, Jr. and Gregory C. Smith, Asst. Attys. Gen., Tallahassee, for appellee.

PER CURIAM.

Appellant Ernest Fitzpatrick was convicted of first-degree murder, two counts of attempted first-degree murder, and three counts of kidnapping. The trial judge imposed a death sentence for the crime of first-degree murder, concurrent sentences of life imprisonment for each attempted murder, and concurrent sentences of thirty years imprisonment for each of the kidnapping offenses. We have jurisdiction to review this case under article V, section 3(b)(1), of the Florida Constitution. We affirm the convictions, the separate kidnapping sentences, and the sentence of death.

On April 29, 1980, appellant entered a realty office with a .38 caliber revolver taped to his hand. He accosted a secretary named Mary Blake and told her he wanted to use her as a shield and take her to a bank located a block away. When she resisted and screamed, he threatened to shoot her in the leg. He took her down a hallway toward the back of the building and rounded a corner. A delivery boy, Eric Shaw, entered the front door and walked down the same hallway, looking for someone to sign a receipt. When he turned the corner appellant pointed the revolver at him and told him not to run or else he would shoot him. Holding Blake around the waist and alternately pointing the pistol at her and at Shaw, appellant forced his two hostages back down the hallway in order to lock the front door. Shaw went to the front door but could not lock it because he did not have a key. He then re-joined appellant and Blake in the hallway.

Meanwhile, David Parks, who was in a nearby office when appellant entered the building, called the sheriff. Emerging from his office and trying to keep his voice as calm as possible, Parks asked Mary Blake what was wrong and if he could help her. Appellant pointed the gun at Parks and told him not to come any closer. Parks offered appellant the keys to his car and some money. Appellant refused, saying he wanted Blake to go with him. Appellant then marched his three hostages into the main

office adjoining the reception area. Appellant sat on a desk chair next to the window in a partition between the main office and the reception area and forced Blake to sit on his lap. He told Shaw to lock the office door and ordered him and Parks to sit down at opposite walls. Appellant said that he would have to shoot the police when they arrived and then shoot his hostages and himself.

Within ten minutes of Parks' phone call, two sheriff's deputies arrived and entered through the front door. The senior one, Deputy Smith, saw Shaw through the open partition and motioned to him to be quiet. Deputy Smith crept down the hallway and tried turning the handle to the office door. Upon finding it was locked he bumped the door a couple of times and announced that he was from the sheriff's department. He heard several voices shout and shots fired. One bullet passed through the wall near his head.

At about the time Deputy Smith stopped knocking, Deputy Heist pointed his gun through the partition and ordered appellant to freeze. Appellant swung around in the chair and shot Deputy Heist in the head, killing him. Shaw unlocked the office door and ran out while Parks jumped appellant, attempting to wrestle the gun away from him. As they fell to the floor struggling, Mary Blake escaped from the office. Appellant fired more shots, hitting Parks in the head. Then he pushed Parks away, stood up, and tried to fire his gun again, but the revolver was empty. Deputy Smith, who had entered the office, fired two shots, hitting appellant in the shoulder.

Appellant was charged with and convicted of the first-degree murder of Deputy Heist, the attempted first-degree murders of Deputy Smith and David Parks, and the kidnappings of Parks, Mary Blake, and Eric Shaw. In accordance with the jury's recommendation the trial judge imposed a sentence of death.

As his first point on appeal appellant argues that he was denied a fair trial in violation of the sixth amendment to the United States Constitution when the trial court refused to excuse four veniremen for cause and refused to grant him additional peremptory challenges. He claims that he was forced to use four of his ten peremptory challenges to excuse veniremen who were biased in favor of the death penalty. During voir dire two of the veniremen stated that the death sentence was appropriate for anyone who committed murder, a third felt death was appropriate if there were eyewitnesses to the murder, and the fourth felt that the death sentence should be imposed anytime a police officer is shot in the line of duty. These statements were made in response to defense counsel's questioning the prospective jurors about their general feelings concerning the death penalty. When the prosecuting attorney explained that under Florida law the death penalty is not automatic under any situation and asked if they would be able to follow the court's instructions and weigh the aggravating circumstances against the mitigating circumstances in making their recommendation, they all said they could.

[1, 2] This case is unlike *Thomas v. State*, 403 So.2d 371 (Fla.1981), where we reversed a defendant's conviction because the trial judge refused to excuse for cause a venireman who conceded that he could not recommend any kind of mercy under any circumstances if the defendant were found guilty of murder. In this case none of the four veniremen ever indicated that he was unalterably opposed to recommending life sentences for convicted murderers. Their statements only indicated a tendency toward being in favor of the death penalty. "A man who opposes the death penalty, *no less than the one who favors it*, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Witherspoon v. Illinois*, 391 U.S. 510, 519, 88 S.Ct. 1770, 1775, 20 L.Ed.2d 776 (1968) (emphasis added). *Witherspoon* requires that veniremen who oppose the death penalty be excused for cause only when irrevocably committed before the trial to voting against the death penalty under any circumstances or where their views on capital punishment would

interfere with finding the accused guilty. We find that the same standard should be applied when excusing for cause a venireman who is in favor of the death penalty. A judge need not excuse such a person unless he or she is irrevocably committed to voting for the death penalty if the defendant is found guilty of murder and is therefore unable to follow the judge's instructions to weigh the aggravating circumstances against the mitigating circumstances.

[3] Appellant's argument that he had an insufficient number of peremptory challenges is premised on the assumption that he unnecessarily used four of them to excuse the above-mentioned veniremen. At oral argument appellant's counsel conceded that there is nothing in the record to show that if appellant had been given more he would have used them. Since we find that the trial judge did not abuse his discretion in declining to excuse for cause the four veniremen, there is no basis for holding that appellant had an insufficient number of peremptory challenges. We therefore hold that appellant's right to a fair trial by an impartial jury under the sixth amendment was not violated.

Appellant's next point on appeal is that the court erred in entering judgments and sentences for the three counts of kidnapping. Appellant argues that Florida's kidnapping statute does not apply where the victim is moved an insignificant distance in a short period of time. *See Friend v. State*, 385 So.2d 696 (Fla. 1st DCA 1980); *Harkins v. State*, 380 So.2d 524 (Fla. 5th DCA 1980). He contends that the emerging trend is to narrowly construe kidnapping statutes so that they do not apply where the kidnapping is inherent in or "merely incidental" to the commission of another crime. *See, e.g., People v. Daniels*, 71 Cal.2d 1119, 80 Cal. Rptr. 897, 459 P.2d 225 (1969); *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976); *People v. Adams*, 389 Mich. 222, 205 N.W.2d 415 (1973); *People v. Levy*, 15 N.Y.2d 159, 256 N.Y.S.2d 793, 204 N.E.2d 842, *cert. denied*, 381 U.S. 938, 85 S.Ct. 1770, 14 L.Ed.2d 701 (1965); *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979).

[4] We recently analyzed these and other cases and concluded that "the 'merely incidental' rule does not apply in situations where the purpose in confining or moving another person is to use that person as a hostage." *Mobley v. State*, 409 So.2d 1031, 1036 (Fla.1982) (footnote omitted). In *Mobley* we affirmed the kidnapping convictions of three prisoners who held two guards and an attorney as hostages during an attempted escape. We noted that although the prisoners "were not charged with confining the victims with the intent of using them as hostages, evidence that they did use them as hostages is relevant and sufficient proof that the kidnappings were not incidental to the attempted escape." *Id.* at 1037. Unlike in *Mobley*, appellant in this case was charged under that portion of the statute that defines kidnapping as the unlawful confining of another person against his will with the intent of holding him as a shield or hostage. *See* § 787.01(1)(a)1, Fla.Stat. (1979). Since there is sufficient evidence to show that appellant confined the victims against their will with the intent to use them as shields or hostages, he committed a kidnapping regardless of the distance the victims were moved or the time they were held. Furthermore the kidnappings in this case were not "merely incidental" to the commission of another crime. *See Faison v. State*, 426 So.2d 963 (Fla.1983). We therefore find there was no error in entering separate judgments and sentences for the three counts of kidnapping.

[5] Next appellant asserts that there was insufficient proof of premeditation to support his convictions for first-degree murder and attempted first-degree murder. This assertion is belied by appellant's statements to the three hostages that he was going to shoot them after shooting the police. The record shows that he did indeed begin shooting after the police had announced their presence. We thus find there was sufficient evidence of premeditation to support these convictions.

We now turn to the sentencing phase of the trial. Appellant first argues that the jury was unduly influenced by the judge's instructing them that two of the statutory aggravating circumstances did not apply. He contends that this instruction implied that the judge felt that all the other aggravating circumstances were applicable.

[6] We do not find any error. The aggravating circumstances which the judge instructed the jury not to consider were whether appellant was under sentence of imprisonment and whether he had previously been convicted of a felony involving the use or threat of violence to another person. Unlike some of the other aggravating circumstances which require some finding be made as to a defendant's subjective intentions for committing a murder, these two aggravating circumstances depend upon factors which can be objectively determined. Since at the time of the sentencing hearing appellant had not been convicted of a prior felony nor was he under sentence of imprisonment, the trial judge correctly concluded that these two aggravating circumstances did not exist as a matter of law at the time the jury was to consider its recommendation. More important, the judge instructed the jury that an aggravating circumstance had to be established beyond a reasonable doubt and that if any aggravating circumstances were found to exist they would have to be weighed against the mitigating circumstances. These additional instructions dispensed with any possible implication that the judge felt all the remaining aggravating circumstances were applicable.

After the jury returned with its advisory recommendation of a death sentence, the trial judge issued his written findings of fact. The judge found that the aggravating circumstance in section 921.141(5)(b), Florida Statutes (1979), was proven. That aggravating circumstance is, "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." *Id.* The judge grounded this finding on the two attempted murder convictions and three kidnapping convictions in this case. The judge also found that, "The defendant knowingly created a great risk of death to many persons." § 921.141(5)(c), Fla.Stat. (1979). The judge based this on the defendant's shooting at not only the murder victim but also at two other men, along with his holding others hostage at gunpoint, causing numerous armed deputies to proceed to his location. The judge also found that the murder was committed while the defendant was engaged in commission of the felony of kidnapping, *id.*, § 921.141(5)(d), based on the proven facts of the case. The judge found further that the murder was committed for the purpose of avoiding or preventing his arrest by Deputy Heist. *Id.*, § 921.141(5)(e). The judge found that section 921.141(5)(*f*), that "the capital felony was committed for pecuniary gain" applied in that the entire incident grew out of appellant's attempt to use hostages to aid him in the robbery of a bank.

Regarding the statutory mitigating circumstances of section 921.141(6), Florida Statutes (1979), the judge found that none of them had been shown. Statutory mitigating circumstance (6)(a), lack of a significant history of criminal activity, was negated, the judge found, by appellant's serious acts of delinquency while a juvenile. The judge found that there was no extreme mental or emotional disturbance under section 921.141(6)(b), and found that testimony showed the defendant to have been in complete control of his behavior. The judge found that there was no consent or participation by the victim, *id.*, § 921.141(6)(c), no major participation or domination by an accomplice, *id.*, § 921.141(6)(d), (e), and no impairment of appellant's capacity to appreciate the criminality of his acts or to conform his conduct to the requirements of the law. *Id.*, § 921.141(6)(*f*). Finally, the judge found that appellant's age of twenty years at the time of the crime was not a mitigating factor because he was mature enough to have been on his own for several years.

Regarding possible nonstatutory mitigating circumstances, the judge found that

there were none, rejecting arguments based on appellant's unfavorable background and the failure of state rehabilitation authorities to intervene.

[7] Even though the trial judge did not instruct the jury on the aggravating circumstance of whether appellant had previously been convicted of a felony involving the threat or use of violence to another person, he himself found it to be an aggravating circumstance. He did so on the basis of the contemporaneous convictions for kidnapping and attempted first-degree murder. This was proper. *See Ruffin v. State*, 397 So.2d 277 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981); *Lucas v. State*, 376 So.2d 1149 (Fla.1979).

[8] The judge also properly found that appellant knowingly created a great risk of death to many persons. *See Lucas v. State; Raulerson v. State*, 358 So.2d 826 (Fla.), *cert. denied*, 439 U.S. 959, 99 S.Ct. 364, 58 L.Ed.2d 352 (1978). The murder occurred during a raging gun battle with the police with three hostages present.

[9, 10] There is no question that the murder was committed while appellant was engaged in the commission of a felony, in this case kidnapping, and that it was committed for the purpose of avoiding or preventing a lawful arrest. The finding that the murder was committed for pecuniary gain is supported by the trial court's finding that appellant had planned a bank robbery for several months and had proceeded as far as the hostage stage before he was interrupted. The fact that the robbery was never completed is irrelevant so long as there was an attempt. *See Mikenas v. State*, 367 So.2d 606 (Fla.1978).

[11] Appellant next challenges the judge's refusal to find any of the statutory mitigating factors present. He claims that he had no significant history of prior criminal activity as an adult. However, he had attempted an armed robbery and a bombing of a school when he was minor. Since the purpose of this mitigating factor is to help ascertain a defendant's character, we do not believe that a trial judge should be limited to looking at a defendant's adult criminal activity. A defendant's juvenile record can be just as relevant in determining the defendant's character. Because appellant's prior criminal activity as a minor was significant, the judge properly found this not to be a mitigating factor.

[12] Appellant also argues that his emotional condition should have been considered as a mitigating circumstance under subsections 921.141(6)(b), (e), and (f), Florida Statutes (1979). There was lay testimony that appellant had mental problems. This was corroborated by a clinical psychologist's testimony that appellant was someone of dull-normal intelligence with grandiose feelings and by a psychiatrist's testimony that appellant had a schizoid personality. All of this testimony was considered and rejected by both the jury and the judge. That decision was theirs and not ours to make. Since there was nothing in the record to indicate that their conclusions or the methods followed in reaching them were improper, we accept their conclusions. *Smith v. State*, 407 So.2d 894 (Fla.1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2260, 72 L.Ed.2d 864 (1982); *Lucas v. State; Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

[13] Appellant argues that the court erred in not finding his age, twenty years, to be a mitigating circumstance. "There is no per se rule which pinpoints a particular age as an automatic factor in mitigation." *Peek v. State*, 395 So.2d 492, 498 (Fla.), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). In this case the record supports the judge's decision not to consider appellant's age as a mitigating circumstance.

[14] Finally appellant argues that his right against double jeopardy was violated by the judge's imposing separate sentences for the three counts of kidnapping. He relies on *State v. Pinder*, 375 So.2d 836 (Fla.1979), where this Court held that in a felony-murder prosecution, the double jeopardy clause bars separate conviction and

sentence for the underlying felony. In *State v. Hegstrom*, 401 So.2d 1343 (Fla. 1981), we receded from *Pinder's* holding that separate convictions could not be entered, but held that section 775.021(4), Florida Statutes (1979), prevented the imposition of a separate sentence for the underlying felony in a felony-murder prosecution. That principle does not apply in this case, however, since there was sufficient proof of premeditation. *See Tafero v. State*, 403 So.2d 355 (Fla.1981), *cert. denied*, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 694 (1982).

We therefore affirm appellant's convictions, the separate sentences for kidnapping, and the sentence of death.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD and EHRLICH, JJ., concur.

McDONALD, J., concurs in part and dissents in part with an opinion, in which OVERTON, J., concurs.

McDONALD, Justice, concurring in part/dissenting in part.

I concur in the judgment of conviction but am unable to do so in the sentence of death. The trial judge erred in finding that Fitzpatrick's killing of the deputy sheriff was for pecuniary gain. While it is true that the deputy interrupted Fitzpatrick's grandiose and bizarre plan to rob a bank, that factor does not convert his slaying into one for pecuniary gain, directly or indirectly. No robbery was in progress when this took place.

I also feel that the trial judge erred when he failed to find both statutory and nonstatutory mitigating circumstances. The evidence was not in dispute on the character and background of Fitzpatrick. It clearly demonstrated a strong personality disorder. His juvenile record reflected a continuing inability to adapt to living in conformity with rules. He thought himself a "genius" and was constantly "inventing" things and seeking patents on them, only to find them constantly rejected. This dull normal black boy, the eighth of thirteen children, was himself rejected by his mother. As stated by the psychologist, "his thinking was indeed impaired and that impairment, according to a degree, was relatively severe, not so severe that he did not understand the consequences of his actions, but severe enough that in my opinion they played a part in his acting very impulsively without proper forethought and setting himself up again for failure and punishment." The testimony is replete with episodes clearly indicating that he suffered from stress and acted under compulsion and with gross impaired thinking. As a juvenile he had been placed in a mental hospital and had attempted suicide.

Fitzpatrick is dangerous. In all likelihood he should never be on the streets again. Nevertheless, I do think there are mitigating circumstances in his case, and that, together with an improperly found aggravating circumstance dictates a remand for reconsideration of the sentence.

OVERTON, J., concurs.

Dan FORBERT, Petitioner,

v.

STATE of Florida, Respondent.

No. 62302.

Supreme Court of Florida.

July 28, 1983.

Rehearing Denied Oct. 10, 1983.

Appeal was taken from sentence imposed by the Circuit Court, Broward County, Barry J. Stone, J., on motion to correct an illegal sentence. The District Court of Appeal, 415 So.2d 96, affirmed and certified question. The Supreme Court, Boyd, J., held that trial court erred in denying petitioner's motion to withdraw his plea of

IN THE SUPREME COURT OF FLORIDA

ERNEST FITZPATRICK, JR., :
Appellant, :
v. : CASE NO. 60,097
STATE OF FLORIDA, :
Appellee. :
:

MOTION FOR REHEARING

COMES NOW the appellant, by and through the undersigned, pursuant to Florida Rule of Appellate Procedure 9.330, and moves this Court for rehearing of its opinion filed July 21, 1983, and as grounds therefor says:

I

In its opinion, this Court approved the trial court's failure to find any mental factors in mitigation. Further, this Court claimed it was powerless to find mental mitagation when not found by the trial judge.

Preliminarily, this is a case where, as Justice McDonald noted in dissent, the mental mitigation was strong and undisputed. This is not a case where the mental mitigation was never argued to the trial court, Hall v. State, 403 So.2d 1321 (Fla. 1981), nor where it was not proven, Daugherty v. State, 419 So.2d 1067 (Fla. 1982); nor where it was rebutted by expert testimony, Stevens v. State, 419 So.2d 1058 (Fla. 1982), nor where it was in conflict, Martin v. State, 420 So.2d 583 (Fla. 1982), nor where it was not clear, Middleton v. State, 426 So.2d 548 (Fla. 1982). Rather, this is a case where the mental mitigation was undisputed and properly presented to the trial court through lay and expert witnesses.

In its opinion, this Court held that "all of this [mental mitigation] testimony was considered and rejected by both the jury and the judge." Slip opinion at 9. Since the jury is not required to return a specific jury form, we cannot

know whether any mental mitigation was found by the jury. However, we do know from the plain wording of the sentencing order that the judge did not consider it. The language of the order shows that the trial judge improperly required the mental mitigation to rise to the level of insanity in order for him to even consider it. In discussing the mitigating circumstances under Section 921.141(6)(b), Florida Statutes, the trial court found "Defendant was in complete control of his behavior according to the doctors' and the defendant's testimony" (R 1330). Further, in discussing the mitigating circumstances under Section 921.141(6)(f), Florida Statutes, the trial court found "The defendant was fully aware of what he was doing, knew that it was wrong, and could conform his conduct to do right had he so des.." (R 1331; emphasis added). This language clearly shows that the trial court was attempting to fit appellant's uncontradicted lay and expert mental testimony into the legal definition of insanity.

Of course, this Court has held that a mental condition far short of insanity must be considered as mental mitigation. In Mines v. State, 390 So.2d 332 (Fla. 1980) the trial court erroneously concluded that since the defendant was found sane and competent to stand trial, the mental mitigation could not be found. This Court properly corrected the error, and held:

> We find unrefuted medical testimony in this record which reflects that appellant had a mental condition diagnosed as schizophrenia, paranoid type. . . . The finding of sanity, however, does not eliminate consideration of the statutory mitigating factors concerning mental condition. The evidence clearly establishes that appellant had a substantial mental condition at the time of the offense. . . . The trial court erred in not considering the mitigating circumstances of extreme mental or emotional disturbance under Section 921.141(6)(b) and the substantial impairment of the capacity of the defendant to appreciate the criminality of his conduct under Section 921.141(6)(f). These circumstances may not be controlling, but they were present in this cause and should have been considered.

Id. at 337. Moreover, in Ferguson v. State, 417 So.2d 631 (Fla. 1982) and Ferguson v. State, 417 So.2d 639 (Fla. 1982), the trial judge, in imposing two death sentences, rejected mental mitigation in the same terms used by the trial judge in the instant case:

> The defendant knew the difference between right and wrong and was able to recognize the criminality of his conduct and to make a voluntary and intelligent choice as to his conduct based upon knowledge of the consequences thereof.

Id. 417 So.2d at 637; emphasis in original. This Court held the trial judge in both Ferguson cases improperly employed the legal test for insanity in failing to find mental mitigation.

The importance of the trial court's very wording of its sentencing order cannot be discounted. For instance, in Quince v. State, 414 So.2d 185 (Fla. 1982) and Hargrave v. State, 366 So.2d 1 (Fla. 1979), because the trial court had specifically discussed the degree of the defendant's mental impairment in its sentencing orders, this Court sustained the rejection of mental mitigation by the sentencing judge. Here, however, the trial judge never even made reference to the many mental factors presented by the evidence, but rather, employed the same insanity standard found to be improper in Mines and Ferguson.

The importance of the language used by the trial judge in his sentencing order is dramatically illustrated by Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983). There the trial court made no reference at all to the mitigating circumstances in Section 921.141(6), Florida Statutes, except to say that they were insufficient to outweigh two aggravating circumstances. Both the trial court's and this Court's cursory conclusions that there were no mitigating circumstances was held to be inadequate by the federal court:

> We are unable to determine whether the judge found no mitigating circumstances or if he found certain mitigating circumstances, which he merely failed to

> specify, and that these were insufficient to outweigh the aggravating circumstances. The Florida Supreme Court's statement on direct review, that "there were no mitigating circumstances to outweigh the aggravating circumstances," 369 So.2d at 931, is equally ambiguous. Moreover, the state in its Response to Foster's district court habeas petition, interprets these findings to mean that, "there were no mitigating factors to be found." If this interpretation is indeed correct, and absent any indication otherwise, it means that the findings of the trial court and the Florida Supreme Court on direct review were clearly and indisputably erroneous based upon the facts on the record.[12]
>
> ---
>
> 12. Petitioner adduced substantial evidence of his long history of psychiatric illness, including episodic psychosis and paranoid schizophrenia, drug and alcohol abuse and dependence, self-mutilation, and a lessened ability to perceive right from wrong. It is beyond per adventure that this proof amounts to support for a finding of mental mitigation . . . .

Id. at 1349; emphasis added. Just as in Foster, "it is beyond per adventure" that appellant's mental condition, undisputed and uncontradicted, mandates the finding of mental mitigation from the evidence of his personality disorder, grandiosity, schizophrenia, compulsion, and his suicide attempt.

This Court further erroneously stated that the decision to find mental mitigation is one for the judge and jury and "not ours to make." Slip opinion at 9. This conclusion is incorrect in light of the language quoted above from Foster. It is also incorrect in light of the many cases from this Court where this Court has found mental mitigation which was not found by the trial judge. For example, in Kampff v. State, 371 So.2d 1007 (Fla. 1979), this Court found extreme mental or emotional disturbance even though not found by the trial court. In Moody v. State, 418 So.2d 989 (Fla. 1982), this Court found personality changes and religious obsessions not found by the trial court. In Menendez v. State, 419 So.2d 312 (Fla. 1982) and Simmons v. State, 419 So.2d 316 (Fla. 1982), this Court found a capacity for rehabilitation of the defendant not found by the trial court. In McCampbell v. State,

421 So.2d 1072 (Fla. 1982), this Court found the following mitigation not found by the trial court: employment and prison record; intelligence; potential for rehabilitation; and family background.

Thus, if this Court approves the failure of the trial court to find mental mitigation from the undisputed evidence, and fails to find it in mitigation on appeal, this Court will suffer the same criticism as it did in Foster. More importantly, it will cause the imposition of an unconstitutional death sentence upon appellant, because of the failure to consider unrebutted mental mitigation. Eddings v. Oklahoma, 455 U.S. 104 (1982). This Court must vacate the death sentence or at least reverse for a new sentencing hearing at which the trial court is directed to make express findings regarding the mental mitigation which do not amount to legal insanity. Foster v. Strickland, supra.

II

In its opinion, this Court approved the finding of pecuniary gain as an aggravating circumstance under Section 921.41(5)(f), Florida Statutes, by citation to Mikenas v. State, 367 So.2d 606 (Fla. 1978). Slip opinion at 8-9. As noted by Justice McDonald's dissent, no robbery was in progress when the murder occurred. Mikenas is poor authority for this Court's conclusion. In that case the defendant and two codefendants entered a store and took the clerk to a back room. They were observed by a deputy sheriff on a stakeout and by a Tampa police officer who entered the store. A gun battle ensued in which the police officer was killed. This Court held the felony murder conviction was proper because the robbery was in progress at the time.

Here appellant went to the real estate office with no intent to commit a robbery there or to obtain anything of value there for pecuniary gain. He expressly rejected Mr. Parks' offer of money and car keys. He took nothing of value at the office. His actions in entering the real estate

the bank robbery, which do not amount to an attempt. See Adams v. Murphy, 394 So.2d 411 (Fla. 1981); Mercer v. State, 347 So.2d 733 (Fla. 4th DCA 1977); and Cooper v. Wainwright, 308 So.2d 142 (Fla. 4th DCA 1975).

This case is more akin to Simmons v. State, 419 So.2d 316 (Fla. 1982), which was cited as supplemental authority but apparently overlooked by this Court. There the defendant killed his lover's husband and there was some evidence that either the defendant or a helper would receive the victim's new car in return. The trial court found pecuniary gain, but this Court struck the finding and held:

> There was not, however, sufficient evidence to prove a pecuniary motivation for the murder itself beyond a reasonable doubt. Such proof cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance.

Id. at 318. This Court also apparently overlooked the supplemental authority provided by the undersigned in Steinhorst v. State, 412 So.2d 332 (Fla. 1982). There the victim stumbled upon a marijuana smuggling operation and was killed. Justice Atkins, sitting as the trial judge, made the following findings in rejecting pecuniary gain:

> Although there would be pecuniary gain in the event the smuggling operation was successful, the court does not find that the murder was committed for pecuniary gain as contemplated by Florida Statues, Section 921.141(5)(f). Although the smuggling operation was for pecuniary gain, the murder was not.

Id. at 339. The same is true in the instant case, for while the bank robbery may have been for pecuniary gain, the murder was not. Because the evidence of pecuniary gain was not proven beyond a reasonable doubt, this aggravating circumstance must be stricken.

In its opinion, this Court rejected appellant's argument that the kidnappings were inherent in or incidental to the commission of another crime, a type of kidnapping defined by Section 787.01(1)(a)2, Florida Statutes, because appellant was charged with kidnapping by holding a hostage as defined by Section 787.01(1)(a)1, Florida Statutes. This is partially true. But the indictment charging each count of kidnapping alleged the type of kidnapping in the alternative: "With intent to hold as a shield or hostage and/or to commit or facilitate commission of any felony" (R 1212; emphasis added). The jury was charged only in the alternative for each type of kidnapping:

> Kidnapping is charged in count one, two and three of the indictment and it means forcibly, secretly, or by threat, confining, abducting, or imprisoning another person against his or her will without lawful authority with intent to hold for ransom or reward or as a shield or hostage or to permit or facilitate the commission of any felony or to inflict bodily harm upon or to terrorize the victim or another person.

(R 819; emphasis added). The verdict form does not specify which type of kidnapping was found (R 1280). Because the jury was not told that it could find appellant guilty of both kinds of kidnapping, but only one or the other, the possibility exists that the jury could have found appellant guilty of kidnapping with intent to commit another felony, not kidnapping with intent to hold a hostage. Thus, this Court's conclusion that appellant's kidnapping convictions rest solely upon the hostage type is erroneous. Because appellant's kidnapping convictions could be based solely upon the facilitating type, this Court must address the question of why they were not incidental to another crime, when the entire incident lasted only ten minutes, and the victims were only moved from the hallway into an adjacent room.

WHEREFORE, appellant requests that rehearing be granted.

Respectfully submitted,

P. DOUGLAS BRINKMEYER
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Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Gregory Smith, Assistant Attorney General, The Capitol, Tallahassee, Florida; and by mail to Mr. Ernest Fitzpatrick, Jr., #076320, Post Office Box 747, Starke, Florida, 32091, this 4 day of August, 1983.

P. DOUGLAS BRINKMEYER
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

THURSDAY, OCTOBER 13, 1983

ERNEST FITZPATRICK, JR.,	**	
Appellant,	**	CASE NO. 60,097
vs.	**	Circuit Court Case No. 80-1281 (Escambia)
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

RECEIVED
OCT 17 1983
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

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CHAPTER 921

SENTENCE

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921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 253, ch. 19504, 1939; CGL 1940 Supp. 8063(264); s. 121, ch. 79-330.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 254, ch. 19504, 1939; CGL 1940 Supp. 8063(265); s. 122, ch. 79-330.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon

the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 2, ch. 79-353; s. 1, ch. 81-209.

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 76-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the Governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 2004, ch. 13564, 1933; CGL 8438, 8437; CGL 1940 Supp. 8437[28]; s. 1, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

THE STATE OF FLORIDA,)
vs.)
ERNEST FITZPATRICK, JR.,) CASE NO. 80-1281-E
Defendant.)
)

FINDINGS AND SENTENCES

As to Count Four of the indictment, wherein defendant was convicted of first degree murder, the Court makes the following findings of fact:

AGGRAVATING CIRCUMSTANCES

(a) WHETHER THE CAPITAL FELONY WAS COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT.

This aggravating circumstance does not exist.

(b) WHETHER THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

This aggravating circumstance does exist. The jury in this case found the defendant guilty, and the Court adjudged the defendant guilty, of two counts of attempted first degree murder and three counts of kidnapping in addition to the capital felony.

(c) WHETHER THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

Defendant has been convicted of killing one man and attempting to kill two other men. In addition, defendant held a gun on two others who were present and in substantial danger of being shot until defendant emptied his pistol. He was captured before causing any additional deaths. He fully intended to shoot it out with the law, and many more deputies were arriving and exposing themselves to a great risk of death. While neither the legislature nor the Supreme Court has specified what number constitutes "many", this Court believes the number involved in this case is too many, and this aggravating circumstance is present.

(d) WHETHER THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF ANY OF CERTAIN ENUMERATED FELONIES.

This aggravating circumstance is present. Defendant was found guilty of committing the capital felony while he was engaged in the commission of kidnapping.

(e) WHETHER THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

This aggravating circumstance is present. Defendant shot and killed Deputy Sheriff Doug Heist for the purpose of avoiding or preventing a lawful arrest.

(f) WHETHER THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

This aggravating circumstance exists. For several months defendant planned a bank robbery which involved taking a hostage as a shield to facilitate the robbery. Defendant got as far as the hostage stage when interrupted by law officers. He never got to the bank, but the entire incident was motivated by a desire for pecuniary gain.

(g) WHETHER THE CAPITAL FELONY WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS.

While the victim of the capital felony was a law enforcement officer working in the line of duty attempting to enforce the laws of the State of Florida and attempting to arrest the defendant for violating the laws, this cannot be considered an additional aggravating circumstance because the Court has found these facts to be an aggravating circumstance under Section 921.141(5)(e), Florida Statutes (1979).

(h) WHETHER THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

This aggravating circumstance does not exist because the homicide

was not especially heinous, atrocious, or cruel as interpreted by prior decisions.

(i) WHETHER THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

This aggravating circumstance is questionable and, therefore, not proven beyond a reasonable doubt. Although the murder was found to be premeditated, the Court believes something more is required to make it "cold" and "calculated".

MITIGATING CIRCUMSTANCES

(a) WHETHER THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

This mitigating circumstance is not present. Defendant's prior criminal activity includes an attempted armed robbery of a convenience store and an attempted bombing of a school. Although these crimes were committed during defendant's minority they constituted law violations and should be considered as criminal activity.

(b) WHETHER THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

This mitigating circumstance does not exist. Defendant was in complete control of his behavior according to the doctors' and the defendant's testimony.

(c) WHETHER THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

This mitigating circumstance is not present. The victim was a law enforcement officer acting in his official capacity lawfully attempting to arrest defendant.

(d) WHETHER THE DEFENDANT WAS AN ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION

WAS RELATIVELY MINOR.

This mitigating circumstance does not exist. Defendant committed the capital felony and had no accomplice.

(e) WHETHER THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

This mitigating circumstance is not present. Defendant was the sole planner and perpetrator of the crime and was not acting under duress or domination of another person.

(f) WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

This mitigating circumstance does not exist. The defendant was fully aware of what he was doing, knew that it was wrong, and could conform his conduct to do right had he so desired. This finding is supported by testimony of the experts and the defendant.

(g) THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

This mitigating circumstance is not present. Defendant was twenty years of age at the time of the crime and had reached a level of maturity sufficient for him to be on his own for several years.

(h) WHETHER ANY OTHER MITIGATING CIRCUMSTANCES EXIST.

There are no non-statutory mitigating circumstances in this case. The Court does not believe defendant's work record or his blaming the deputies for the manner of their apprehension to be mitigating factors. Also, the failure of the State to rehabilitate defendant as a juvenile is just as farfetched. Defendant was given all of the treatment available. Who can say another form of therapy would have been successful? The State cannot guarantee successful rehabilitation of every delinquent. At some point, the individual must face responsibility for his own acts.

In SUMMARY the Court finds sufficient statutorily defined aggravating circumstances exist to justify the death penalty and that there are no statutorily defined or other mitigating circumstances to outweigh the aggravating circumstances found to exist.

It is, therefore, ORDERED that the Defendant, Ernest Fitzpatrick, Jr., under Count 4 of the Indictment for the crime of murder in the first degree be committed to the custody of the Department of Corrections of the State of Florida to be punished by death in the electric chair or as otherwise provided by law.

It is further ORDERED that the Defendant Ernest Fitzpatrick, Jr. under each of Counts 1, 2, and 3 of the Indictment for the crimes of kidnapping be committed to the Department of Corrections of the State of Florida to be punished by life imprisonment with credit for 220 days served in the county jail, and

ORDERED that the Defendant Ernest Fitzpatrick, Jr. under each of Counts 5 and 6 of the Indictment for the crimes of attempted first degree murder be committed to the Department of Corrections of the State of Florida to be punished by confinement for a term of thirty years, and said defendant shall be required to serve a minimum mandatory three years without eligibility for parole with credit for 220 days served in the county jail, and

ORDERED that the sentences imposed under each count of the Indictment shall run concurrently.

Defendant is advised of his right to an automatic appeal, and Attorney James R. McAtee is hereby appointed to represent defendant on the appeal.

DONE AND ORDERED at Pensacola, Escambia County, Florida, this 5th day of December, 1980.

M C Blanchard
CIRCUIT JUDGE